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ETIQA GENERAL TAKAFUL BHD v. PERSONAL REPRESENTATIVE OF FATIMAH ADAM (DECEASED) & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
B [ORIGINATING SUMMONS NO: WA-24NCC-346-08-2021]
20 APRIL 2022

Abstract – *The insured, pursuant to s. 129 and Schedule 9 of the Financial Services Act 2013, has the duty of utmost good faith to disclose the most important fact of the intended policy coverage, but such duty may be waived if the insurer chooses not to make the necessary inquiries relevant to the decision-making in relation to the policy. However, s. 129 and Schedule 9 have no application in a case where the contract of insurance has never, in fact and in law, come into existence or is void ab initio.*

INSURANCE: *Motor insurance – Policy – Validity of insurance contract – Renewal of insurance policy subsequent to demise of insured – Whether insurer had knowledge of demise of insured when policy issued – Whether third person who renewed policy had insurable interest – Whether valid contract of insurance existed – Whether breach of duty of uberrimae fide – Whether insurer waived right to complain for failure to pose questions to insured or her representatives – Financial Services Act 2013, s. 129 & Schedule 9*

F On 19 May 2019, an accident occurred involving the motorcycle no. JPJ 3597 ridden by the third defendant with the motorcar no. MBX 2201, driven by the second defendant. The fourth defendant was riding pillion with the third defendant. At the time of the accident, Policy No. KA791155 had been issued for the motorcar no. MBX 2201 ('insured car') in the name of Fatimah Adam ('insured'), by the plaintiff for the period of coverage from 22 June G 2018 to 21 June 2019. The second defendant was the husband of the insured. The plaintiff subsequently discovered that the insured had passed away on 23 June 2016. At the time of her death, the plaintiff had issued its Policy No. A0914878 for the period of coverage from 18 June 2016 to 17 June 2017. A further Policy No. KA621722 was issued in the name of Fatimah H subsequent to her death for the period of coverage from 22 June 2017 to 21 June 2018. Following the accident, the third and fourth defendants filed a personal injury claim against the first defendant, the personal representative of Fatimah, and the second defendant for general and special damages sustained by them ('civil action'). In the absence of any evidence that the I plaintiff was ever informed of the demise of the insured, at any time, be it

prior to the purchase of the Policy No. KA621722 or Policy No. KA791155 and any constructive knowledge of the demise of the insured, the plaintiff contended that the first and second defendants had breached the principle of *uberrimae fide* when the Policy No. KA791155 was renewed without revealing the demise of the insured. Hence, the plaintiff sought to have the Policy No. KA791155 declared as null and void under s. 97(1) and (3) of the Road Transport Act 1987. The third and fourth defendants rejected the plaintiff's assertion of a breach of the duty of *uberrimae fide*, maintaining that the plaintiff had the obligations pursuant to the Policy No. KA791155 to bear all liabilities of the defendants under the civil action in respect of the accident.

Held (allowing plaintiff's application):

(1) The motor vehicle insurance is a consumer insurance contract. Section 129 and Schedule 9 of the Financial Services Act 2013 ('FSA') govern the pre-contractual duty of disclosure and representations that could render the consumer insurance contract voidable for breach of the mutual duty of utmost good faith or *uberrimae fide* that is owed at all times by both parties to the insurance contract. In para. 2 of Schedule 9, 'consumer insurance contract' is defined as a 'contract of insurance entered into … by an individual wholly for the purpose unrelated to the individual's trade, business or profession'. (paras 18 & 22)

(2) Paragraph 5 of Schedule 9 deals with the pre-contractual duty of disclosure for consumer insurance contract. Whilst sub-paras. (1) to (6) of para. 5 deal with the consumer's duty of disclosure with regards to information required by the licensed insurer, sub-paras. (7) to (9) in turn deal with the duty of disclosure by the consumer without any prompting by the licensed insurer. Given that the consumer has a legal duty to take reasonable care to disclose any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied, it stands to reason that the information that is required by the licensed insurer from the consumer in sub-paras. (1) and (3) must be matters which are over and above the scope of the consumer's duty of disclosure or matters which arise from the disclosure provided by the consumer pursuant to his duty of disclosure including any changes to matters previously disclosed by the consumer. (paras 37 & 48)

(3) In the case where an application for an insurance contract is made after the happening of the very event intended to be insured against, merely because the insurer may have failed to request any specific questions from the consumer, it will not result in the waiver of the consumer's duty to disclose the happening of the said event as this would be a duty

under sub-paras. (8) and (9). Similarly, where the contract is entered into or renewed after the consumer has passed away, the failure or omission by the insurer to request specific questions from the consumer will also not be deemed as the insurer having waived the disclosure of the said fact. Such non-disclosure will result in the insurance contract being voidable at the instance of the insurer. (paras 56 & 57)

(4) Although the insured passed away on 23 June 2016, the subsequent insurance policies, Policy No. KA621722 and Policy No. KA791155 were purchased in her name. These policies were new, separate and distinct contract notwithstanding the fact that they were 'renewal policies'. The terms in cl. 3 of Policy No. KA791155 indicated that the policy was only to cover the period expressly provided in the policy. Thus, when the insured passed away, the Policy No. A0914878 which was effective from 18 June 2016 to 17 June 2017 would come to an end on 17 June 2017. Thereafter, the insured, on account of her death would lack any capacity to enter into any renewal policy with the plaintiff. (paras 64-66)

(5) There was no evidence that (i) the plaintiff had any knowledge at all, whether actual or constructive, of the insured's demise when the Policy No. KA 791155 was renewed; (ii) the policy was renewed by the legal representative or executor of the estate of the insured; and (iii) the person who had renewed the policy had any insurable interest at all in the motorcar no. MBX 2201. As far as the plaintiff was concerned, the policy was renewed by Fatimah who, as it turned out, was already dead at the time of the renewal of the said policy. As there could be no contract that could validly exist as a matter of law when the Policy No. KA791155 was issued to Fatimah, it must follow that the plaintiff was entitled to the declarations prayed for. The plaintiff was to refund to the person who paid the Policy No. 791155 and Policy No. KA621722, all premiums paid thereunder. The third and fourth defendants were left without any redress for the indemnity claims against the plaintiff. (paras 73-75)

Case(s) referred to:

AmGeneral Insurance Bhd v. Shahrul Aziman Abd Aziz & Anor [2019] 1 LNS 953 HC ***(refd)***
Balamoney Asoriah v. MMIP Services Sdn Bhd [2020] 1 CLJ 476 CA ***(dist)***
Liberty Insurance Bhd v. Marrison Sidai & Anor [2019] 8 CLJ 380 HC ***(refd)***
Malaysia Motor Insurance Pool v. Eastern Moon Enterprise & Anor [2019] 10 CLJ 230 HC ***(refd)***
O'Kane v. Jones And Others [2003] All ER (D) 510 ***(refd)***
Pacific & Orient Insurance Co Bhd v. Lim Poh Ewe As The Representative Of The Estate Of Lim Eng Hock Deceased & Ors [2017] 1 LNS 585 HC ***(refd)***
Pacific & Orient Insurance Co Sdn Bhd v. Lim Sew Chong & Anor [1982] 1 LNS 119 HC ***(dist)***
Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 11
Financial Services Act 2013, s. 129, Schedule 9 Part 1 paras 1(3), 2, Part 2 para 5(1), (2), (3)(a), (b), (4), (5), (6), (7), (8), (9)
Road Transport Act 1987, ss. 97(1), (3)

For the plaintiff - Raymond Sivasothey; M/s Kenneth William & Assocs
For the 3rd & 4th defendants - Hemaashri Mohney; M/s Ibrahim Aziz & Co

Reported by S Barathi

JUDGMENT

Ong Chee Kwan JC:

Introduction

[1] The main issue in this action relates to the validity of a car insurance policy that was renewed in the name of the insured after her demise. There is no evidence that the insurer had actual or constructive knowledge of the insured's demise.

[2] This judgment deals with the Court of Appeal's decision in *Balamoney Asoriah v. MMIP Services Sdn Bhd* [2020] 1 CLJ 476, the interpretation of para. 5 of the Schedule 9 of the Financial Services Act 2013, the capacity of a deceased to enter into a contract and the duty of utmost good faith imposed under the said para. 5 of Schedule 9 therein.

Background Facts

[3] On 19 May 2019 at about 5pm, an accident occurred involving the motorcycle no. JPJ 3597 ridden by the third defendant with the motorcar no. MBX 2201 ("the accident").

[4] At the time of the accident, the motorcar was driven by the second defendant. The fourth defendant was riding pillion with the third defendant.

[5] At the time of the accident, a Certificate of Takaful No. KA791155 ("the Policy No. KA791155") had been issued for the motorcar no. MBX 2201 ("the insured car") in the name of Fatimah bte Adam ("the insured"). The Policy No. KA791155 was issued by the plaintiff through Pos Malaysia on 18 June 2018 at 2:46 pm for the period of coverage from 22 June 2018 to 21 June 2019. The second defendant was the husband of the insured.

[6] The accident was corroborated by the police reports lodged by the second defendant and the third defendant on 20 May 2019 and 29 May 2019 respectively at the Jasin Traffic Station.

[7] Subsequent to the accident, the plaintiff discovered through its adjuster that the insured, namely Fatimah bte Adam had passed away on 23 June 2016. At the time of her death, the plaintiff had issued its Certificate of Takaful No. A0914878 for the period of coverage from 18 June 2016 to 17 June 2017 ("Policy No. A0914878").

A **[8]** It is not in dispute that a further policy was issued in the name of Fatimah bte Adam subsequent to her death under the Certificate of Takaful No. KA621722 for the period of coverage from 22 June 2017 to 21 June 2018 ("Policy No. KA621722").

B **[9]** Based on the JPJ search done on 26 June 2019 by the third and fourth defendants' solicitors, it would appear that the second defendant has been the registered owner of insured car at the latest by 26 June 2019. However, there is no evidence before this court as to the exact date the insured car was registered in the name of the second defendant after the death of the insured, Fatimah bte Adam.

C **[10]** The third and fourth defendants have filed a personal injury claim for general dan special damages sustained by them following the accident against the first defendant, being the personal representative of Fatimah bte Adam and the second defendant at the Melaka Sessions Court Summons No. MA-A53KJ-269-08-2020 ("the civil action").

D **[11]** As alluded to above, the Policy No. KA791155 was purchased in the name of Fatimah bte Adam and not for the second defendant. Neither was the said policy purchased in the name of the personal representative or estate of Fatimah bte Adam. In fact, the Policy No. KA791155 expressly named the second defendant as the "authorised driver".

E **[12]** It is significant that there is no evidence at all placed before this court that the plaintiff was ever informed of the demise of insured, Fatimah bte Adam at any time, be it prior to the purchase of the Policy No. KA621722 or the Policy No. KA791155. Neither is there any suggestion that the plaintiff had constructive knowledge of the insured's demise.

F **[13]** Based on the aforesaid, the plaintiff contended that the first and second defendants have breached the principle of *uberrimae fide* when the Policy No. KA791155 was renewed at the post office, Malaysia on 18 June 2018 at 2:46 pm for the period of coverage from 22 June 2018 to 21 June 2019 without revealing the demise of the insured.

G **[14]** On the basis of the aforesaid breach, the plaintiff is seeking to have the Policy No. KA791155 to be declared as null and void under ss. 97(1) and (3) of the Road Transport Act 1987 ("the RTA 1987").

H **[15]** The third and fourth defendants reject the plaintiff's assertion of breach the duty of *uberrimae fide*, maintaining that the plaintiff has the obligations pursuant to the Policy No. KA791155 to bear all liabilities of the defendants under the civil action in respect of the accident.

[16] The first and second defendants did not participate in this proceeding.

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Court's Deliberation

[17] Both learned counsel for the plaintiff and the third and fourth defendants have referred this court to s. 129 and Schedule 9 of the Financial Services Act 2013 ("FSA 2013").

[18] Section 129 and Schedule 9 of the FSA 2013 govern the pre-contractual duty of disclosure and representations that could render the consumer insurance contract voidable for breach of the mutual duty of utmost good faith or *uberrimae fide* that is owed at all times by both parties to the insurance contract.

[19] Section 129 states:

> **129 Pre-contractual disclosure and representations, and remedies for misrepresentations**
>
> (1) Schedule 9 sets out the pre-contractual duty of disclosure and representations for contracts of insurance in Part 2, and the remedies for misrepresentations relating to contracts of insurance in Part 3.
>
> (2) ...

[20] Part 1 para. 1(3) of Schedule 9 clearly states that:

> For the purposes of obtaining a declaration under subsection 96(3) of the Road Transport Act 1987, this Schedule shall apply to determine if a consumer insurance contract which provides cover for third party risks may be avoided by a licensed insurer for misrepresentation.

[21] Schedule 9, part 2 para. 5 deals specifically with pre-contractual duty of disclosure for consumer insurance contracts

[22] There is no dispute that the motor vehicle insurance is a consumer insurance contract. In para. 2 of Schedule 9, 'consumer insurance contract is defined as a 'contract of insurance entered into ... by an individual wholly for the purpose unrelated to the individual's trade, business or profession'.

[23] The relevant provisions of para. 5 of Schedule 9 are:

> 5. Pre-contractual duty of disclosure for consumer insurance contracts
>
> (1) Before a consumer insurance contract is entered into or varied, a licensed insurer may request a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.
>
> (2) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph (1).
>
> (3) Before a consumer contract is renewed, a licensed insurer may either:

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(a) Request a consumer to answer one or more specific questions in accordance with subparagraph (1); or

(b) Give the consumer a copy of any matter previously disclosed by the consumer in relation to the contract and request to confirm or amend any change to that matter.

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(4) It is the duty of the consumer to take reasonable care not to make a misrepresentation to the licensed insurer when answering any questions under subparagraph 3(a), or confirming or amending any matter under subparagraph 3(b).

(5) If the licensed insurer does not make a request in accordance with
C subparagraph (1) or (3) as the case may be, compliance with the consumer's duty of disclosure in respect of those subparagraphs, shall be deemed to have been waived by the insurer.

(6) Where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under
D subparagraph (1) or subparagraph (3)(a) or fails to confirm or amend any matter under subparagraph 3(b) or does so incompletely or provides irrelevant information, as the case may be, and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

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(7) A licensed insurer shall, before a consumer insurance contract is entered into, varied or renewed, clearly inform the consumer in writing the consumer's pre-contractual duty of disclosure under this paragraph, and that this duty of disclosure shall continue until the time of contract is entered into, varied or renewed.

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(8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter other than that in relation to subparagraph (1) and (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

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(9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other including the making and paying of a claim, after a contract of insurance has been entered into, varied or renewed.

[24] Learned counsel for the third and fourth defendants relied heavily on
H heavy reliance was placed on the decision of the Court of Appeal in *Balamoney Asoriah v. MMIP Services Sdn Bhd* [2020] 1 CLJ 476 ("*Balamoney*").

[25] In *Balamoney*, the Court of Appeal held that the provisions under s. 129 and Schedule 9 of the Financial Services Act are mandatory requirements. In particular, the whole process and procedure under
I Schedule 9 must be complied with. In the event that there is no evidence of any questions posed at the time of renewal or the entering of the insurance contract, it is no longer open to the insurer to come to court complaining of any misrepresentation.

[26] Relying on sub-para. (5) of Schedule 9, the Court of Appeal held that if the insurer does not undertake the exercise of posing questions when considering whether or not to assume the risks and enter into a contract of insurance with the customer, the insurer is taken to have waived the right to complain of any breach of the duty of disclosure.

[27] More specifically, Her Ladyship Mary Lim Thiam Suan JCA (as she then was) said the following:

> [61] The authorities such as the Federal Court decision in *Pacific & Orient Insurance Co Berhad v. Hameed Jagubar Syed Ahmad* (*supra*) and the Court of Appeal decision in *Jayakumar Rajoo Mohamad v. CIMB Aviva Takaful Berhad* [2015] 9 CLJ 552, cited by the respondent were decided under the old law and were concerned with contracts of insurance made prior to the coming of operation of section 129 and Schedule 9 of Act 758 on 1.1.2015, and are thus, not applicable.
>
> [62] We would not be wrong to suggest that the law must have been amended to address the hardship that third parties, like the appellant before us, face in cases where the validity of the insurance policies are challenged and the court is asked to grant declarations under section 96(3) of Act 333. The third parties are simply not in the position to address any of the issues that may arise like the appellant and have in fact arisen as we see in this appeal. This then whittles down to naught the very benefit and purpose that was intended under section 90 of Act 333 and section 129 of Act 758.

[28] On the new statutory regime, Her Ladyship held:

> [46] We can appreciate this new statutory regime under section 129 and Schedule 9; that consistent with the intent of the statutory regime emplaced under section 90 and 96 of Act 333 to ensure the meaningful presence of assumption of minimum third party risks, there must be a balanced and mutual duty of utmost good faith owed by all parties to the contract, whether it is a contract of insurance or a consumer insurance contract.
>
> [47] In the case of third party risks, it is almost impossible for innocent third parties who are involved in road traffic accidents to be in possession of any knowledge of the contract of insurance or the consumer insurance contract, let alone the conditions or circumstances under which such contracts were made. The enactment of the statutory regime that we now see in Schedule 9 evens out or balances that duty of utmost good faith and makes the safeguards under Act 333 more meaningful and its social intent or objectives of minimum compulsory insurance, respected and achieved.

[29] This led Her Ladyship to decide thus:

> [51] If there is any breach of this duty of disclosure, whether by reason of incomplete disclosure, failure to disclose or giving any irrelevant answers, subparagraph 5(6) obliges the respondent to follow up on that failure or on that incomplete answer. If the respondent does not do so, then the respondent shall be deemed to have waived the right to complain

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> [52] ... It is our firm view that paragraph 1(3) must be complied with as its terms are couched in mandatory language. The failure of the learned judge to apply section 129 and Schedule 9 is sufficient reason for this court to intervene and set aside the decision of the learned Judge granting the declaration sought under section 96(3) of Act 333.

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[30] Armed with the case of *Balamoney*, learned counsel for the third and fourth defendants submitted that the plaintiff can no longer complain about the non-disclosure of the death of Fatimah bte Adam since there is no evidence that the plaintiff had posed any questions to the insured and or her
C representative at the time the Policy No. KA 971155 was purchased.

[31] On the other hand, learned counsel for the plaintiff urged this court not to follow *Balamoney* for the reasons that the Court of Appeal had not taken into consideration other provisions in s. 5 in coming to its decision. Learned counsel for the plaintiff cited 2 High Court decisions which, according to
D him, do not appear to have followed *Balamoney*.

[32] In *AmGeneral Insurance Bhd v. Shahrul Aziman Abd Aziz & Anor* [2019] 1 LNS 953; [2019] MLJU 671, Wong Chee Lin J held at para. [32] of her judgment as follows:

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> [32] What if the licensed insurer does not ask the proposer any question and the coverage is provided in silence? Then it is clearly spelt out in sub-paragraph (5) of the said Schedule that if the "licensed insurer does not make a request in accordance with subparagraph (1) and (3)" of the said Schedule then the need to disclose "has been waived by the insurer". However, it is provided in subparagraph 8 that "Subject to subparagraphs
F (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied." This provision seems to contradict the provision in subparagraph 5. Subparagraph 5 seems to indicate that a proposer's duty only extends to
G the answering of specific questions posed to him by the insurer whereas subparagraph 8 seems to indicate that his duty of disclosure extends beyond that of simply answering the specific questions posed to him. The way I would reconcile the 2 provisions is to construe the position to be such that when a specific question is not posed to the proposer by the insurer and the proposer keeps silent, then the matter shall be deemed to
H be waived by the insurer unless the proposer knew for a fact that the matter is relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

[33] In coming to her decision, the learned High Court Judge did not deal expressly with the decision of the Court of Appeal in *Balamoney*.

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[34] In another High Court case, Mohd Nazlan J in *Liberty Insurance Bhd v. Marrison Sidai & Anor* [2019] 8 CLJ 380; [2019] 12 MLJ 763 in dealing with Schedule 9 of the FSA 2013 held as follows:

Schedule 9 to the Financial Services Act 2013

[32] In the instant case before me however, I do not think it is correct either in principle, policy or especially in law that the duty of utmost good faith on the part of the insured in disclosing what should be the most important fact of the intended policy coverage can be so easily displaced by the failure of the insurer to make the necessary inquiries that could have allegedly ascertained the truth. I should add that there is no evidence either way as to whether the plaintiff had made the request for the first defendant to answer questions relevant to the intended coverage.

[33] However, at the hearing, counsel for the plaintiff submitted that the cover note was applied for and issued at a post office. Modern insurance industry practice now accepts online applications. In this regard, it should be mentioned that under para 6(1)(a) of Schedule 9 to the Financial Services Act which applied to the policy in the instant case, it is stated that in determining whether an insured has taken reasonable care not to make a misrepresentation in answering questions posed by the insurance company, relevant circumstances that may be taken into account include the contract in question and the manner in which the contract was sold. It can thus be safely assumed that the first defendant had been asked to answer specific questions in the online application form but no evidence was produced to show the form in question, and how the first defendant answered them.

[34] In any event, the conduct of the first defendant applying for a policy coverage after the happening of the very event intended to be insured against surely can be argued to be nothing but a patent attempt to engage in an improper conduct. It is potentially a fraud pure and simple. Just because the insurer 'did not ask' (if indeed the plaintiff did not) cannot be a legitimate basis for the law to permit the wrongdoing to continue to be perpetuated, or at least for the insured to benefit therefrom. I should emphasise however that the first defendant does not contest the instant application by the plaintiff.

[35] Additionally, in *Mohd Faiz bin Zulkifli*, it was held that non- disclosure by the insured to the insurance agent when asked would tantamount to a fraud, and that if the agent had asked, he would have discharged his responsibility. In my view, a fraud is a fraud. The fact that the party being defrauded failed to have done inquiries should not mean the fraud can be excused and transaction resulting therefrom enforced.

[36] Furthermore, little is achieved if the requirement is only for the insurer to show it had made inquiries with the insured if the latter, intent on committing the fraud by virtue of the deliberate act of applying after the event, would almost certainly, and not unsurprisingly concealed the truth. When faced with a potential fraud, the requirement of making inquiries is close to being meaningless. I accept that if the insured provided untrue answers to queries made by the insurance agent, the misrepresentation would be more manifest and more readily capable of rendering the policy void.

A [37] However, in my view, the act of applying for a policy after an accident meant to provide the coverage is already so patently wrong. It does not have to be considered as wrongful and fraudulent only if the insured concealed the accident if and when asked by the agent.

[38] This is thus supported by the provisions of the Financial Services Act 2013 ("the FSA") which came into force after the policy in *Hameed Jagubar* B became effective. *Hameed Jagubar* and the cases it referred to did not therefore have to consider the application of the FSA.

[39] Whilst sub-paras (1) and (3) of para 5 of Schedule 9 to the FSA on pre-contractual duty of disclosure do provide for the insured's duty of disclosure to be waived if the insurer chooses not to request the insured C answer specific questions relevant to the decision-making of the insurer whether or not to accept the risks and on the setting of the pertinent terms, sub-para (8) nevertheless still imposes on the insured the duty to take reasonable care to disclose any matter that he knows to be relevant to the decision making of the insured.

D [40] Subparagraph (8) reads as follows:

> (8) Subject to subparagraphs (1) and (3), a consumer shall take reasonable care to disclose to the licensed insurer any matter, other than that in relation to subparagraph (1) or (3), that he knows to be relevant to the decision of the insurer on whether to E accept the risk or not and the rates and terms to be applied.

[41] Perhaps most significantly, it is in any event made explicit by para 5(9) of Schedule 9 that the duty of the utmost good faith on the part of both the insured and the insurer in respect of the dealings with one another continues unaffected by the provisions of the Schedule. Thus, the first F defendant would continue to be under the duty to make the requisite disclosure in adherence to the duty of utmost good faith, even after the policy had been issued. The provision reads as follows:

> (9) Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with each other, including the making and paying of a G claim, after a contract of insurance has been entered into, varied or renewed.

[42] Accordingly, given the clear requirements of Schedule 9 to the FSA, it can no longer be the law that failure to ask the potential insured to answer pre-qualification questions necessarily waives the insured's H disclosure obligations under the duty of the utmost good faith.

[43] This must be correct. For what is the point of giving effect to a contract of insurance which has been obtained irregularly? It is absolutely unacceptable for the court to countenance a state of affairs which has a clear effect of condoning or worse, even encouraging road users to drive I without being in possession of road tax and insurance coverage until the occurrence of an accident. This is certainly a blatant violation of public policy at the same time.

[35] Although Mohd Nazlan J had expressed the view that '... it can no longer be the law that failure to ask the potential insured to answer pre-qualification questions necessarily waive the insured's disclosure obligations under the duty of the utmost good faith', the learned judge in that case was dealing with a policy that was purchased only after the accident in question had occurred.

[36] Notwithstanding the aforesaid, I find much force in the reasonings by both Justice Wong Chee Lin and Justice Mohd Nazlan (now CJA) in their respective judgments.

[37] Paragraph 5 of Schedule 9 clearly deals only with the pre-contractual duty of disclosure for consumer insurance contracts.

[38] It seems to me that in interpreting para. 5, one must bear in mind sub-para. (9) which expressly refers to the existence of an underlying duty of utmost good faith on both a consumer and licensed insurer in their dealings with each other in a contract of insurance notwithstanding the provisions in Schedule 9.

[39] This duty of utmost good faith is further emphasised in sub-para. (7) where the licensed insurer is required to clearly inform the consumer in writing of his pre-contractual duty of disclosure before a consumer insurance contract is entered into, varied or renewed. Sub-paragraph (7) in fact provides that this duty of disclosure is to continue until the time of contract is entered into, varied or renewed. This sub-paragraph confirms that the duty does not simply impose an obligation on the assured to disclose prior to the contract being formed, but also continues during the life of the policy.

[40] Sub-paragraph (8) stipulates the scope of the consumer's duty of disclosure *ie*, the consumer is to take reasonable care to disclose to the licensed insurer any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied.

[41] The knowledge of the material fact which should have been disclosed must be capable of being imputed to the person providing information to the underwriter or must be a fact of which the person ought to have been aware in the ordinary course of business. (In this regard, whether this duty to 'take reasonable care to disclose to the licensed insurer any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied' is equated to a duty of 'a fair presentation of the risks' is a matter for another day).

[42] Sub-paragraph (8) however expressly carved out from the general duty of disclosure 'matter other than in relation to sub-paras. (1) and (3)'.

A **[43]** More specifically, sub-para. (1) refers to the disclosure required by the licensed insurer in the case of a fresh or new contract where a licensed insurer requests a proposer who is a consumer to answer any specific questions that are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to be applied.

B **[44]** Sub-paragraph (3) on the other hand refers to the disclosure required by the licensed insurer in the case where the existing contract is renewed. In such a case, a licensed insurer may either under sub-para. (3)(a) request the consumer to answer one of more specific questions in accordance with sub-para. (1) or under sub-para. 3(b) give the consumer a copy of any matter C previously disclosed by the consumer in relation to the contract and request the consumer to confirm or amend any change to that matter.

[45] Sub-paragraph (4) and sub-para. (6) impose upon the consumer the duty to take reasonable care not to make a misrepresentation to the licensed insurer when answering the questions under sub-para. (1) and sub-para. (3)(a) D or when confirming or amending any matter under sub-para. (3)(b).

[46] In the event that the licensed insurer chose not to make a request in accordance with sub-paras. (1) and (3), sub-para. (5) expressly provides that the consumer's duty of disclosure 'in respect of those sub-paragraphs' shall E be deemed to have been waived by the insurer.

[47] Similarly, sub-para. (6) provides that where the consumer fails to answer or gives an incomplete or irrelevant answer to any request by the licensed insurer under sub-para. (1) and sub-para. (3)(a) or fails to confirm or amend any matter under sub-para. (3)(b) or does so incompletely or F provides irrelevant information as the case may be and the answer or matter was not pursued further by the insurer, compliance with the consumer's duty of disclosure in respect of the answer or matter shall be deemed to have been waived by the insurer.

[48] Whilst sub-paras. (1) to (6) deal with the consumer's duty of disclosure G with regards to information required by the licensed insurer, sub-paras. (7) to (9) in turn deal with the duty of disclosure by the consumer without any prompting by the licensed insurer. Given that the consumer has a legal duty to take reasonable care to disclose any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the H rates and terms to be applied, it stands to reason that the information that is required by the licensed insurer from the consumer in sub-paras. (1) and (3) must be matters which are over and above the scope of the consumer's duty of disclosure (which in the opinion of the insurer are relevant to the decision of the insurer whether to accept the risk or not and the rates and terms to I be applied) or matters which arise from the disclosure provided by the consumer pursuant to his duty of disclosure including any changes to matters previously disclosed by the consumer.

[49] When the provisions in sub-paras. (4) and (6) are juxtaposed with sub-para. (8), the matters that would be deemed waived by the insurer would not involve matters that the consumer would have to disclose under sub-para. (8) but only matters which the insurer requires from the consumer by way of specific questions or the confirmation or amendments of any change to matters previously disclosed. To be more precise:

(i) The scope of the matter coming under sub-paras. (1) and (3)(a) is confined to matter falling outside the consumer's general duty of disclosure. This will include cases where the insurer has received information (either from the consumer or otherwise) which taken on its own or in conjunction with other information known to the insurer or presumed to be known to the insurer would naturally prompt a reasonably careful insurer to make further inquiries by way of specific questions and if the insurer omits to do so, they are deemed to have waived any disclosure of the material facts and matters which such an inquiry would have revealed. Similarly, if such specific questions are asked of the consumer, where the consumer fails to answer or gives an incomplete or irrelevant answer to the request, the consumer's duty of disclosure in respect of the answer or matter raised thereto shall also be deemed to have been waived by the insurer.

(ii) The scope of the matter coming under sub-para. 3(b) is confined only to the consumer's failure to confirm or amend any change to the matter previously disclosed or if the consumer did confirm or amend the changes, does so incompletely or provides irrelevant information and where the insurer does not pursue further the answer or the matter, compliance with the consumer's duty of disclosure in respect only of such answer or matter shall be deemed to have been waived by the insurer.

[50] This is the reason why sub-paras. (4) and (6) refer only to the duty 'not to make a misrepresentation' and make not mention of the duty to make full disclosure of material facts. The relevant disclosure in sub-paras. (1) and (3)(a) are disclosure in response to a request by the insurer of matter not generally within the consumer's general duty of disclosure. This is not to say that the insurer cannot include in the questions matters which the consumer is already obliged to disclose under his general duty of disclosure. Whether the questions give rise to a waiver of the consumer's general duty to disclose all material information is ultimately a matter of construction of the document.

[51] Some useful guidance on this is given by Richard Siberry QC sitting as Deputy High Court Judge in *O'Kane v. Jones And Others* [2003] All ER (D) 510 where he addressed the issue of waiver arising from the questionnaire by way of *obiter* in paras [237] to [238]:

237. Wellington's submission on waiver was based on the content of the carefully crafted Argonaut Questionnaire. This began by stating that "Quotations will be based on the following details", and then proceeded to list the details required of the assured, which included current insurers with terms, conditions, deductible and rating level, and vessel details including details of the next drydocking and of the maintenance programme. Wellington pointed out that the Questionnaire required no information about premium payment record, or about owners' financial status or any indebtedness between owners and managers or mortgagees. They submitted that by requiring the specified information, Jones necessarily intimated that this was the only information they required in order to assess the risk and provide a premium quotation, and that they did not, for example, require information as to past premium payment record, financial status or outstanding indebtedness. In these circumstances, it was submitted, they must be taken to have waived disclosure of such matters insofar as they were material, and the assured were thereby relieved by MIA section 18(3)(c) of any obligation to disclose such matters. Jones responded by contending that the circumstances relied on by Wellington fell far short of establishing a case of waiver by implication.

238. As Asquith LJ stated in *Schoolman v. Hall* [1951] 1 Lloyd's Rep 139 at page 143:

> It is unquestionably plain that questions in a proposal form may be so framed as necessarily to imply that the underwriter only wants information on certain subject-matters, or that within a particular subject-matter their desire for information is restricted within the narrow limits indicated by the terms of the question, and, in such a case, they may *pro tanto* dispense the proposer from what otherwise at common law would have been a duty to disclose everything material.

The issue as to whether questions in a proposal form give rise to a waiver in relation to other matters is to be determined in the manner stated in MacGillivray on *Insurance Law*, 10th edn (2003), paragraph 17-19 (the corresponding passage to which, in a previous edition, was cited with approval by Woolf J in cited with approval in *Hair v. The Prudential Assurance Co Ltd* [1983] 2 Lloyd's Rep. 667), as follows:

> Whether or not such waiver is present depends on a true construction of the proposal form, the test being: would a reasonable man reading a proposal form be justified in thinking that the insurer had restricted his right to receive all material information and consented to the omission of the particular information in issue.

[52] This brings me to sub-para. (5). This deals with the case where the insurer chose not to make any request in accordance with sub-paras (1) and (3). In an such eventuality, sub-para. (5) stipulates that the '... compliance with the consumer's duty of disclosure in respect of those sub-paras. shall be deemed to have been waived by the insurer'.

[53] In this regard, if the consumer had complied with his general duty of disclosure and the insurer fails or chose not to request further information from the consumer in respect thereof, the insurer cannot thereafter seek to avoid the contract on the ground of non-disclosure in respect of such further information that the insurer could have received if a request by way of specific questions was made.

[54] I agree with the observation my Justice Mohd Nazlan in *Liberty Insurance Bhd* that the failure to ask the potential insured to answer pre-qualification questions will not necessarily result in the waiver of the insured's disclosure obligations under the duty of the utmost good faith.

[55] To hold otherwise would completely negate the consumer's duty to take reasonable care to disclose under sub-para. (8) any matter that he knows to be relevant to the decision of the insurer on whether to accept the risk or not and the rates and terms to be applied in the event the insurer fails or decide not to make the request in accordance with sub-paras. (1) and (3). This will result in a dramatic shift of the burden to the insurer to seek out all relevant information from the consumer before a consumer insurance contract is entered into and or renewed. It will also limit the consumer's duty to take reasonable care not to make a misrepresentation to the insurer only to the specific questions asked and or to his confirmation or amendment to any change to any matter previously disclosed by the consumer. It leads to an abandonment of the consumer's general duty of disclosure. This cannot be the case.

[56] Thus, in the case where an application for an insurance contract is made after the happening of the very event intended to be insured against, merely because the insurer may have failed to request any specific questions from the consumer will not result in the waiver of the consumer's duty to disclose the happening of the said event as this would be a duty coming under sub-paras. (8) and (9).

[57] Similarly, in the case where the contract is entered into or renewed after the consumer has passed away, the failure or omission by the insurer to request specific questions from the consumer will also not be deemed as the insurer having waived the disclosure of the said fact. Such non-disclosure will result in the insurance contract being voidable at the instant of the insurer.

[58] However, *Balamoney* is a decision by the Court of Appeal and is binding on this court. I understand that an appeal against the decision is now pending before the Federal Court. Until the decision is reversed or affirmed as the case maybe, I am bound by *stare decisis* to follow it.

[59] However, the *Balamoney* was dealing with s. 129 and Schedule 9 of the Financial Services Act 2013 which provide for the consequences of the failure by the insurer to pose questions to the intended assured prior to the

formation of a new insurance contract or the renewal of an existing contract. The consequences of such failure will result in the insurer being deemed as having waived its right to complain of the breach of any duty of disclosure by the insured to invalidate the contract.

[60] The s. 129 and Schedule 9 are not provisions regulating the legal requirements needed for the formation of the contract of insurance at all. In fact, the s. 129 and Schedule 9 work on the assumption that there is a valid contract in existence which is voidable where there is a breach of duty of disclosure unless deemed waived under the provisions.

[61] The aforesaid is clear when we read Part 1 para. 1(3) of Schedule 9 which expressly stipulates thus:

> For the purposes of obtaining a declaration under subsection 96(3) of the Road Transport Act 1987, this Schedule shall apply to determine if a consumer insurance contract which provides cover for third party risks may be avoided by a licensed insurer for misrepresentation.

[62] In other words, the Schedule shall apply only to determine the voidability or otherwise of an existing and valid consumer insurance contract covering for third party risks.

[63] Thus, it is my respectful opinion that s. 129 and Schedule 9 will have no application in a case where the contract of insurance never in fact and in law come into existence or is void *ab initio*.

[64] In the present case, the insured, Fatimah bte Adam had passed away on 23 June 2016. Notwithstanding the aforesaid, the subsequent insurance policies, *ie*, Policy No. KA621722 and Policy No. KA791155 were still purchased in her name. These policies are new, separate and distinct contract notwithstanding the fact that they are 'renewal policies'. That this is so clear when one look at cl. 3 of the Policy No. KA791155 which provides:

> 3. Cover for Legal Personal Representatives
>
> Following the death of any person covered under this Certificate, that person's legal representatives will be indemnified for liability covered under this Section, provided such legal representatives comply with all the terms and conditions of the Certificate.

[65] The aforesaid term indicates that the said policy is only to cover the period expressly provided in the policy.

[66] Thus, when the insured, Fatimah bte Adam passed away on 23 June 2016, the Policy No. A0914878 which was effective from 18 June 2016 to 17 June 2017 would come to an end on 17 June 2017. Thereafter, the insured, on account of her death would lack any capacity to enter into any renewal policy with the plaintiff.

[67] In *Malaysia Motor Insurance Pool v. Eastern Moon Enterprise & Anor* [2019] 10 CLJ 230; [2018] MLJU 779, Lim Chong Fong J held that para. 5 of Schedule 9 applies to consumer insurance contracts on the

presupposition that the insurance contract is validly procured in the first place. This is said to be implicit because it is so fundamental that the parties must have legal capacity in the formation of all contracts as provided in s. 11 of the Contracts Act 1950. The learned judge held at para. [23]:

> Hence in the context of an insurance contract, there must be a competent person in existence as insured to procure a valid insurance. Paragraphs 5(1) and (3) of Schedule 9 are only then attracted in furtherance of a valid insurance contract to regulate the methodology of communication of risks between the insured and the insurer. The object is to enable the insurer to determine the appropriate price and or terms during the initial procurement and renewal of the insurance respectively ...
>
> ... since Arumugam a/l Sokalingam was already dead at the material time of the renewal of the Policy, I find and hold that the First Respondent could not therefore lawfully renew it ... As the result, it is immaterial that someone else had renewed the Policy purportedly for the First Respondent. Accordingly, I hold that the Policy herein is void.

[68] Further, in *Pacific & Orient Insurance Co Bhd v. Lim Poh Ewe As The Representative Of The Estate Of Lim Eng Hock Deceased & Ors* [2017] 1 LNS 585; [2017] MLJU 547, the High Court held:

> It is trite that the person seeking to insure must be a subsisting natural person or body corporate having insurable interest. I therefore hold that disclosure of the fact of death of the insured who is a natural person is material and mandatory. Non-disclosure would thus avoid the renewal of the insurance policy *ab initio.*
>
> ... find the fact of the death of Lim Eng Hock deceased was not revealed to the plaintiff at the material time of renewal of the motor vehicle insurance policy on 1 February 2013. There is no evidence before me to the contrary. I further find that the plaintiff only discovered the same after a claim has been made upon the insurance policy.
>
> Although the plaintiff acknowledged having received and accepted the payment for the renewal and accordingly renewed the motor vehicle insurance, it did not derogate the general right of the plaintiff to treat the insurance policy as void when such material fact had been suppressed and not disclosed to the plaintiff. Furthermore, since an insurance contract is one of *uberrimae fide*, there is no duty on the part of the plaintiff to investigate or inquire on the living status of the insured as this would otherwise be unnecessarily burdensome upon the insurer. It must be borne in mind the commercial reality that lots of motor vehicle insurance policies are taken up daily.

[69] The above is not to say that the legal estate of the deceased cannot renew the insurance policy after the death of the insured.

[70] In *Pacific & Orient Insurance Co Sdn Bhd v. Lim Sew Chong & Anor* [1982] 1 LNS 119; [1985] 2 MLJ 60, Abdul Hamid FCJ held that an executor *de son tort* has an insurable interest and was competent to take out an insurance policy in respect of the motor-lorry which was the estate

property. The facts of the case are similar to our present case but with an important difference, namely that the insurer there was found to have knowledge of the insured's death when the insured's son renewed the policy for the benefit of the estate of the deceased. The learned judge held as follows:

> The legal question for this court to determine is whether Ng Moh Chee had the capacity to contract for a policy of insurance. It is common ground that Ng Moh Chee was granted Letters of Administration in 1973 but they were not extracted. Nevertheless it is a fact that at all material times he managed the estate of his father the deceased assuming thereby the character of an executor *de son tort*.
>
> *Halsbury's Laws of England* Vol. 16 3rd Ed. p. 120 para 172 defines an executor *de son tort* to mean "one who takes upon himself the office of an executor, or intermeddles with the goods of a deceased person, without having been appointed an executor by the testator's last valid will or codicil thereof, or without having obtained a grant of administration from a competent court ...."
>
> On the facts not in dispute it would seem to me that when Ng Moh Chee took it upon himself to secure an insurance policy in respect of the motor-vehicle the property of his deceased father he was in fact acting in the character of an executor de son tort and in that character had the capacity to do what is beneficial to the estate. If I may I would briefly refer to the plaintiffs' submission that by virtue of sections 10(1) and 11 of the Contracts Act, 1950 (Act 136) Ng Hwee Bin, the deceased, had no capacity to contract. With all respect, I do not think there has been a suggestion that the deceased had the capacity to contract. The defendants' case is that Ng Moh Chee was the one who had the capacity to do so and Ng Moh Chee was the insured and that the plaintiffs were fully aware that he was. The plaintiffs have also contended that Ng Moh Chee had no capacity to sign on behalf of the deceased as the vehicle was not in his name. It is a fact known to all concerned that the vehicle was not in the name of Ng Moh Chee and it was never represented that he was signing on behalf of the deceased. Ng Moh Chee was a son managing the estate of his father and in that capacity he assumed the character of executor *de son tort*. The materials before the court clearly show that Mr. Gan of Minsoon Credit Corp. (Pte.) Ltd. had full knowledge that Ng Moh Chee was managing the estate of his late father and was insuring his late father's vehicle.
>
> It is true that Ng Moh Chee did not state in the proposal form that he was an executor. The reason is obvious. He did not know that in law he had assumed such character. At any rate I do not think he could be expected to know. As far as he was concerned he assumed the responsibility of managing the estate and for the benefit of the estate he had to take it upon himself to insure the motor-vehicle, the estate property.
>
> The next question for determination is whether in the capacity of an executor *de son tort* Ng Moh Chee had an insurable interest. The following passage from MacGillivray, *Insurance Law* 5th Ed. Vol. 1 at p. 445/6 (7th Ed. p. 119) shows that he has:

> INSURABLE INTEREST IN PROPERTY Definition of. Insurable interest in property is not confined to the absolute legal ownership. Generally, any person who is so situated that he will suffer loss as the proximate result of damage to or destruction of the property has an insurable interest in it. But there must be some direct relationship to the property itself, for otherwise the interest is too remote and therefore not insurable. In *Lucena v. Craufurd* Lord Eldon said, 'I am unable to point out what is an interest unless it be a right in the property or a right derivable out of some contract about the property,' and if we add to this, 'or some legal liability to make good the loss,' we get a substantially accurate definition of insurable interest in property. Some modern American cases support the rather wider proposition that a person has an insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he would suffer loss, regardless of title, legal or equitable.

My view is that there seems to be clear law to show that an executor *de son tort* has an insurable interest and Ng Moh Chee acting in the capacity of executor *de son tort* was competent to take out an insurable policy in respect of the motor-vehicle which was the estate property.

[71] In *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1, Abdul Hamid Embong FCJ provided further clarification to the concept of 'insurable interest':

> However, we wish to clarify that to determine whether the appellant had any insurable interest is not dependent on it being the legal owner of the aircraft alone. Insurable interest can be established either by ownership, possession or direct relationship to the subject matter of the insurance. Thus, one has an insurable interest if by taking out an insurance policy one gains a benefit from the preservation of that subject matter or suffers a disadvantage should it be lost. In *Standard Chartered Bank v. KTS Sdn Bhd* [2006] 4 MLJ 617; [2006] 4 CLJ 79, the Federal Court held that 'to constitute an insurable interest the person insuring the property must have a legal or equitable interest in the property insured'. The interest in the insured property is thus not confined to just a legal interest *per se*. To substantiate this proposition we refer to this paragraph on the categories of persons who have insurable interest in general insurance from *Halsbury's Laws of Malaysia* Vol 4 at para 60.034 which says:
>
> > Broadly speaking, the following persons would be considered to have an 'insurable interest' in the subject matter in which they are respectively interested: owners of property; vendors and purchasers; landlords and tenants; bailors and bailees; pledgors and pledges; consignors and consignees; common carriers and other carriers; mortgagors and mortgagees; lienholders; shareholders in their shares; agents in their commission; a trader in his stock in trade and profits; a hirer in the thing hired; an insurer in his risk (right of reinsurance).

[72] Unfortunately, in the present case, no evidence has been adduced to establish who had in fact renewed the Policy No. KA791155 and paid for the same.

[73] There is certainly no evidence that the plaintiff had any knowledge at all, whether actual or constructive, of the insured's demise when the Policy No. KA791155 was renewed.

[74] What is plain is that the Policy No. KA791155 was renewed in the name of the insured, Fatimah bte Adam. Unlike the facts in *Pacific & Orient Insurance Co Sdn Bhd v. Lim Sew Chong & Anor* (*supra*), there is no evidence to suggest that the Policy No. KA791155 was renewed by the legal representative or executor of the estate of the insured. There is no evidence that the person who had renewed the said policy had any insurable interest at all in the motorcar no. MBX 2201. As far as the plaintiff was concerned, the Policy No. KA791155 was renewed by Fatimah bte Adam, who as it turns out, was already dead at the time of the renewal of the said policy.

[75] Accordingly, because there could be no contract that could validly exist as a matter of law when the Policy No. KA791155 was issued to Fatimah bte Adam, it must follow that the plaintiff is entitled to the declarations prayed for in encl. 1 with no order as to costs. The plaintiff is to refund to the person who paid the Policy No. 791155 and Policy No. KA621722, all premiums paid thereunder.

[76] I appreciate that by this decision, the third and fourth defendants would be left without any redress for their indemnity claims against the plaintiff. Unfortunately, the position is no difference from the case where the insured's policy had expired and not renewed by the time of the accident.

[77] I must also add that it was not argued before this court that *vis-a-vis* the third and fourth defendants, the plaintiff is estopped from assuming its obligations under the Policy No. KA971155 notwithstanding that the said policy may be void between the plaintiff and the insured. After all, should not the third and fourth defendants be entitled to rely and assumed that the plaintiff, as the insurer of the insured car and having accepted the premium paid, would have issued a valid insurance policy to enable the owner of the car to pay the road tax for the car to be legally used on the road? To be clear, it is premature for this court to express any view at all with such an argument which undoubtedly will require the benefit of detailed submissions from counsel supported by the relevant authorities and principles of estoppel. This is best left for another day.